THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.32053 of 1998

Date 04.10.2005

Between:

Md.Yakub Shareef, R/o.Nidadavole, W.G.District.

..... PETITIONER

AND

The Chief Personnel Manager, APSRTC, Musheerabad, Hyderabad.

.....RESPONDENT

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.32053 of 1998

O R D E R:

Proceedings dated 08.08.1997, whereby the Depot Manager, APSRTC, Nidadavole, dispensed with the services of the petitioner in terms of the order dated 06.08.1997 with immediate effect, while directing him to return back all equipment held by him belonging to the Corporation, is impugned in this writ petition.

Facts, to the extent necessary for this writ petition, are that the petitioner's father, a driver in the APSRTC, retired from service on 31.08.1988 on attaining the age of superannuation. The petitioner had passed Matriculation in the year 1987-88 and as such was fully eligible to be appointed in the post of Conductor in the APSRTC. The petitioner applied for the post of Conductor, under the ex-employees' children quota, since he was living with his father and was entitled to do so in terms of the circular dated 07.11.1986. Pursuant to the representation made by the petitioner's father, the Divisional Manager, West Godavari District, Eluru, (second respondent herein), vide letter dated 15.03.1991, called upon the petitioner to attend his office on 25.03.1991 for interview along with the certificates mentioned therein. Since there was no response from the respondents with regard to petitioner's request and on enquiry, the petitioner learnt that since his elder brother one Md.Sultan sharif was already working in APSRTC on his being appointed as casual labourer on 28.04.1980 prior to the retirement of his father, he was not given appointment. The petitioner submits that his brother joined in the APSRTC as a sweeper on 28.04.1980 and his services were subsequently regularized on 28.03.1991 as a cleaner and he was posted at Bhimavaram Depot, West Godavari District. The petitioner would contend that his brother's appointment in the APSRTC is not as a dependant of a retired employee of the APSRTC.

The petitioner filed W.P.No.9151 of 1993 before this Court seeking a declaration against the second respondent in not considering the petitioner's application for the post of Conductor in terms of the circular dated 26.11.1987, whereunder, applications from children of retired employees were required to be considered for the post of Conductor. This Court in WPMP.No.11543 of 1993, dated 22.07.1993, passed the following order:

> "Mr.V.Rajagopal Reddy, the learned standing counsel for Andhra Pradesh State Road Transport Corporation submits that a clarification was issued by the respondents-Corporation on 18.03.1993 stating that the children of the deceased employee shall not be entitled for appointment, if another child of the deceased employee was already in service and the decisions of this court in Writ Petition No.8825/91 dated 10.04.1992 and in Writ Petition No.11623/91 dated 31.03.1992 are not applicable.
>
> This court considered the circular dated 26.11.1987 issued by the respondents-corporation, in which there was a similar situation and came

> to the conclusion that there is no bar for consideration for appointment of the children of the de ceased employee even if there was another child in service appointed prior to the death of the employee.
>
> In that view of the matter, there shall be a direction to the respondents to consider the case of the petitioner for appointment as a Conductor in the services of the Corporation, immediately, notwithstanding the circular dated 26.11.1987 and the clarification circular dated 18.03.1993, pending further orders".

The petitioner filed C.C.No.164 of 1994. Pursuant to the order dated 20.09.1995 in the said contempt case, the petitioner was appointed as Conductor, vide proceedings dated 05.10.1995, and joined in the said post on 10.10.1995. W.P.No.9151 of 1993, filed by the petitioner, was dismissed following the earlier order of this Court in W.P.No.11593 of 1996, dated 20.12.1996, which was confirmed in W.A.No.142 of 1997 and batch. This Court, while dismissing the writ petition, however, observed that the dismissal order would not come in the way of the petitioner seeking fresh appointment along with other candidates, if he is entitled under law and that the authorities shall give weightage if he is otherwise eligible and entitled for the period for which he served in the respondent-Corporation. Pursuant to the order passed by this Court in W.P.No.9151 of 1993, dated 16.06.1997, the third respondent issued proceedings dated 08.08.1997 dispensing with the services of the petitioner. The petitioner sought review of the order in WPMP.No.32289 of 1998, dated 19.08.1998 and this Court while dismissing the review petition, passed the following order:

> "Delay condoned.
>
> Having heard the learned counsel, we do not find that there is any ground made out for review. What is urged now by the learned counsel is that the petitioner was employed not as the son of the erstwhile employee but on his own merit, and that his services have been terminated subsequent to the decision of the writ petition. We do not think that such factual position can be subject of review of our judgment or clarification in our judgment. The petitioner is at liberty to seek appropriate relief in appropriate manner."

As a result of which, the petitioner has chosen to challenge the very same proceedings of the third respondent dated 08.08.1997 by way of the present writ

petition.

Sri M.V.Raja Ram, learned counsel for the petitioner, would submit that a Division Bench of this Court in **SHAIK AHMAD ALI SHAH V. DIVISIONAL MANAGER, APSRTC**, considered the same circular of the APSRTC whereby preferential treatment was given to sons of the employees of the APSRTC and while dismissing the writ petition held thus:-

> "Notwithstanding this position, it was quite startling that the management of the A.P.State Road Transport Corporation 37 years after the Republican Constitution came into force, though it legal and proper to practise hereditarianism in the matter of public employment by issuing the circular dated 05.10.1987 to thwart the Constitutional injunction embodied in Cl.(2) of Art.16 of the Constitution. We do not know the cause for this Constitutionally abhorrent practice; whether it is a voluntary act of the management to appease the work-force in the corporation or whether it is the out-come of collective bargaining between the management and the labour. Whatever may be the cause, the practice is liable to be condemned as unconstitutional and retrograde. Hereditary appointment has no place in public employment. If this practice were to continue, the establishment of the APSRTC, in course of time, would have emerged as a "closed shop" consisting only or mainly of the descendents of the serving or retired or deceased employees of the Corporation. The scheme, whether it is planned or innocent, should be thwarted to uphold the republican character of the Constitution. It is a matter of satisfaction that the Corporation has realized its mistake though lately and disbanded the unconstitutional circular in 1995.
>
> In the result and for the foregoing reasons we dismiss the writ petition. No costs. However, we make it clear that this order shall not come in the way of the respondents considering the case of the second petitioner for the post of Cleaner or Khalasi or any other post on merit and in accordance with the statutory service regulations governing recruitment provided the second petitioner fulfills the prescribed qualifications, along with other applicants similarly circumstanced. The second petitioner is not entitled for any preferential treatment on the ground that he is the son of a serving employee of the Corporation."

Following the order of the Division Bench in **SHAIK AHMAD ALI SHAH** (1 supra), another Division Bench of this Court in **G.GANGADHAR V. CHIEF PERSONNEL MANAGER & OTHERS** (W.P.No.2646 of 1994, dated 27.11.1997), passed the following order:

> "Heard the learned counsel for the petitioner and the learned standing counsel for the respondent Corporation.

> The writ petition was admitted by this Court on 21.02.1994 and interim orders to consider the case of the petitioner were granted on the same day. By virtue of the interim orders or voluntarily, the authorities of the Corporation has appointed the petitioner as Conductor. Hence it is ordered that the petitioner shall be continued. The petitioner is also entitled to all benefits as if he was appointed against a regular post.
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> With the above direction, the writ petition is disposed of. No costs."

Sri M.V.Raja Ram, learned counsel for the petitioner, would submit that the earlier order in **SHAIK AHMAD ALI SHAH** (1 supra) and the subsequent order in **G.GANGADHAR** require the Corporation to continue those employees as Conductors, who had been appointed pursuant to the interim orders of this Court. It is only in the case of the petitioner that a similar order directing continuance in services of the petitioner was not passed. Learned counsel would submit that the petitioner is entitled for the similar benefit and since his appointment was also pursuant to the interim orders of this Court, he should also be continued in service as a Conductor and that the action of the third respondent in dispensing with his services is contrary to the law laid down by the Division Bench in **SHAIK AHMAD ALI SHAH** (1 supra) and **G.GANGADHAR**. Insofar as the order of the Division Bench in W.P.No.9151 of 1993 is concerned, Mr.M.V.Raja Ram, learned counsel for the petitioner, would submit that since the order in the said writ petition was passed on 16.06.1997 subsequent to the order in **SHAIK AHMAD ALI SHAH** (1 supra), dated 12.09.1996, the Division Bench ought to have followed the directions issued by the earlier Division Bench and departure from the binding precedent in **SHAIK AHMAD ALI SHAH** (1 supra) would render the judgment in W.P.No.9151 of 1993, dated 16.06.1997 "*Per incuriam*". Learned counsel would place reliance on **FUERST DAY LAWSON LTD. V. JINDAL EXPORTS LTD**., wherein the Supreme Court held that in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the weight of a binding precedent and that "*per incuriam*" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on

which it is based, is found, on that account to be demonstrably wrong.

Learned counsel would submit that, in any event of the matter, in the review petition in WPMP.No.32289 of 1998 in W.P.No.9151 of 1993, dated 19.08.1998, the Division Bench had held that the factual position could not be subject of the review of their judgment or clarification in their judgment and that the petitioner was at liberty to seek appropriate relief at appropriate time. Sri M.V.RajaRam, learned counsel for the petitioner, would submit that the liberty granted to the petitioner to seek appropriate relief in the appropriate manner would necessarily mean by way of a fresh writ petition challenging the very same order dated 08.08.1997.

The doctrine of "*per incuriam*" is used to decide as to whether a precedent is a binding precedent or not. It is no doubt true that a subsequent Division Bench is required to follow the law laid down by an earlier Division Bench and in case it chooses to disagree, the matter has necessarily to be referred to a Full Bench. The question, which, however, arises for consideration in this case is as to whether the said doctrine of *per incuriam* is applicable to the facts of the present case. The judgment in W.P.No.9151 of 1993 is a judgment inter-parties and as such, is binding on the petitioner. It is well settled that even if a judgment, inter-parties, is erroneous, the only remedy available is by way of an appeal to a higher Court and cannot be the subject matter of a collateral attack.

What the petitioner, in effect, is seeking is for an order from this Court to declare the order of the Division Bench in W.P.No.9151 of 1993, dated 16.06.1997. "*per incuriam*". It is certainly not permissible for a Single Judge of this Court to hold a judgment inter-parties, even if it be of another Single Judge of this Court, *per incuriam*, let alone, an order of a Division Bench. The only remedy available to the petitioner, in case he was aggrieved by the order in W.P.No.9151 of 1993, dated 16.06.1997, was either to seek review of the order or to prefer an appeal to the Supreme Court. The review petition filed by the petitioner was dismissed by the Division Bench. The remedy available, as observed in the order passed in review, can only be by way of an appeal, against the original order, to the Supreme Court and not by way of a fresh writ petition before this Court.

Sri M.V.Raja Ram, learned counsel for the petitioner would submit that the case of the petitioner deserves sympathetic consideration. It does appear that in the cases which came up earlier before the Division Bench in **SHAIK AHMAD ALI SHAH** (1 supra) and the subsequent order in **G.GANGADHAR**, those employees who were continued in service were permitted to be continued as such. However, a similar relief was not granted to the petitioner. Unfortunate, it may be, but that would not entitle the petitioner to question a judgment inter-parties by way of a subsequent writ petition before this Court.

The writ petition fails and is accordingly dismissed. There shall however be no order as to costs.

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04.10.2005

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